U.S. Department of Labor

Office of Administrative Law Judges 800 K Street, NW, Suite 400-N Washington, D.C. 20001-8002

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In the Matter of:

HERSHEL C. ROBBINS (deceased)
ANNA RUTH ROBBINS (widow),
Claimants,

v.

WALLINS HARLAN COAL COMPANY, INC.,

Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest.

Dated: APRIL 19, 2001 CASE NO.: 2000-BLA-163

Appearances:

Ron Carson, Lay Representative For the Claimant

H. Ashby Dickerson, Esq. For the Employer

BEFORE: MOLLIE W. NEAL

Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This case arises from claims for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 et seq., and the regulations issued thereunder, at Title

20, Code of Federal Regulations (C.F.R.), Parts 718 and 725, as amended. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

The miner, Hershel Robbins, filed three applications for benefits under the Act. His first application for black lung benefits was filed on June 27, 1973 (DX 112), and was denied by the Office of Worker's Compensation Programs (OWCP) on November 13, 1980. No appeal was taken from that decision. A second claim was filed on January 7, 1992, and was denied as a duplicate claim in August 31, 1993 (DX 113), and the claim was closed as abandoned.

On April 28, 1998, the miner filed a third claim (DX 55), which was denied after an informal conference (DX 99). In this decision, issued on January 20, 1999, the District Director found the evidence insufficient to establish pneumoconiosis, total disability, and the requisite change in condition provided by Section 718.309 of the regulations. The miner died on October 23, 1998, after he had filed his third claim and prior to the District Director's denial of that claim. The miner's wife filed a timely request for modification of the denial of the miner's claim, on February 17, 1999, and her claim for survivor's benefits, on January 19, 1999. (DX 1; DX 103). The modification request was denied on August 19, 1999. (DX 105) The widow's claim was denied on July 13, 1999. (DX 48) The cases were consolidated and referred to the Office of Administrative Law Judges for a formal hearing on December 23, 1999. (DX 114; DX 115)

Upon due notice, a hearing was held before the undersigned in Abingdon, Virginia on October 18, 2000. At that time, all parties were afforded full opportunity to present evidence and argument as provided in the Act and the regulations issued thereunder, found in Title 20 of the Code of Federal Regulations. The Claimant requested that the matter

¹ 29 C.F.R. § 718.2 states: "This part is applicable to the adjudication of all claims filed after March 31, 1980..." The revised definitions in §725.101 apply. "The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001, in connection with a claim governed by this part ..." 20 C.F.R. §718.101(b).

 $^{^2}$ In this Decision and Order, "DX" refers to the Director's exhibits, "EX" refers to the Employer's exhibits, and "Tr." refers to the transcript of the hearing.

be decided on the evidence of record. Documentary evidence, Director's exhibits 1-116, and Employer's exhibits 1-10 were admitted into the record. (Tr. 5-7). The parties agreed that there was no need to hold the record open for additional evidence or post-hearing briefs. (Tr. 13-14).

On February 29, 2001, pursuant to Paragraph 3 of the Preliminary Injunction entered by the United States District Court for the District of Columbia on February 9, 2001, this Court asked the parties to submit briefs on the issue of whether the amended regulatory provisions at 20 C.F.R. §§ 718.104 (d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205 (c)(5), or 718.205(d) would affect the outcome of this claim. The briefs of the Director, Worker's Compensation Programs, and the Employer have been received. The Claimant did not respond. Pursuant to my Post Hearing Order of February 28, 20001, and based on the concessions of the parties, I find that the amended regulations will not affect the outcome of this claim.

The issues presented for adjudication are: (1) whether the miner had pneumoconiosis which arose out of his coal mine employment; (2) whether the miner was totally disabled due to pneumoconiosis; (3) whether, pursuant to Section 725.310 of the regulations, the miner had established a material change in condition or a mistake in a determination of fact in the prior denial of his claim; and (4) whether the miner's death was due to pneumoconiosis. The following findings and

The Preliminary Injunction in National Mining Associates, et al, v. Chao, et al, stays the implementation of many of the amended regulatory provisions. However, with respect to claims pending before the office of Administrative Law Judges ("OALJ"), the Court's order provides that:

All claims for black lung benefits pending before the Department's Office of Administrative Law Judges at the time of this order or which become pending within the period set by the Court for briefing, hearing and decision on the merits, shall be stayed for the duration of the briefing, hearing and decision schedule set by the Court, except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of the case. (Emphasis added)

⁴ At the hearing, the Employer withdrew the contested issue of whether it was the proper Responsible Operator (Tr.7), and accepted the Director's finding that the miner had worked 26 years in qualifying coal mining employment, eliminating the issue of length of coal mine employment. (Tr. 8).

conclusions are based upon my analysis and review of the entire record, arguments of the parties, and applicable statutes, regulations, and case law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Coal Mine Employment

Mr. Robbins last worked in coal mining in 1991 and left this work at age of 1963 because of breathing and other health problems. His last coal mine job was loading coal by hand. (DX 57) This job involved standing for about seven and one half hours per day and carrying and lifting 50 to 100 pounds about 12 times per day.

As the Act and Regulations do not provide specific guidelines for determining length of coal mine employment, any reasonable method may be used. See Dawson v. Old Ben Coal Co., 11 BLR 1-58, 1-60 (1988); Bennett v. Leckie Smokeless Coal Co., 4 BRBS 420, 428 (1976). Claimant, however, bears the burden of establishing length of coal mine employment. See Rennie v. U.S. Steel Corp., 1 BLR 1-859, 1-862 (1978). At the hearing, the parties did not dispute the District Director's finding that the miner worked for 26 years in qualifying coal mine employment. Based on the documents of record, including the Social Security Earnings Statement and the miner's own description of his past employment, and the parties' acceptance of the Director's finding, I find that Mr. Robbins worked as a coal miner for 26 years.

II. Summary of the Medical Evidence

A. X-ray Reports 5

The symbol "B" denotes a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. See 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. See Woodward v. Director, OWCP, 991 F.2d 314, 316 n.4 (6th Cir. 1993); Sheckler v. Clinchfield Coal Co., 7 BLR 1-128, 1-131 (1984). The symbol "BCR" denotes a physician who has been certified in radiology or diagnostic roentgneology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206 (B)(2).

<u>Exhibit</u>	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 113-18	2/18/92	7/15/92	Sargent/B, BCR	0/0
DX 16	2/18/92	2/25/92	Tiu/BCR	1/1, p/q
DX 113-33	5/14/92	5/14/92	Broudy/B	0/0
DX 113-30	5/14/92	5/14/92	Dahhan/B	0/0
DX 113-30	5/14/92	8/6/92	Dineen/B	0/0
DX 113-32	5/14/92	8/17/92	Wershba/B, BCR	0/0
DX 113-32	5/14/92	8/21/92	Gogineni/BCR	0/0
DX 113-25	6/4/92	6/16/92	Dineen/B	0/0
DX 89	7/1/92	7/1/92	Anderson	1/0, p/q
DX 111	7/1/92	11/26/99	Dahhan/B	0/0
EX 8	7/1/92	12/16/99	Wheeler/B, BCR	0/0
EX 9	7/1/92	12/16/99	Scott/B, BCR	0/0
DX 15	11/5/92	11/6/92	Lane/B	1/0, p/q
DX 107	11/5/92	8/23/99	Dahhan/B	0/0
DX 109	11/5/92	9/14/99	Scott/B, BCR	0/0
DX 109	11/5/92	9/15/99	Wheeler/B, BCR	0/0
DX 102	11/10/92	11/10/92	Dahhan/B	0/0
DX 113-34	11/10/92	1/17/93	Duncan/B, BCR	0/1
DX 113-34	11/10/92	1/30/93	Robinson/B, BCR	0/0
DX 113-34	11/10/92	1/20/93	Lauks/B, BCR	0/0
DX 113-35	11/10/92	2/11/93	Hayes/B, BCR	0/0
DX 17	11/10/92	4/20/99	Scott/B, BCR	0/0
DX 18	11/10/92	4/16/99	Scott/B, BCR	0/0
DX 54	11/10/92	5/21/99	Gogineni/B, BCR	0/0
DX 19	12/19/92	12/19/92	Wright/A	1/1, q/q
DX 106	12/19/92	8/5/99	Scott/B, BCR	0/0
DX 106	12/19/92	8/5/99	Wheeler/B, BCR	0/0
DX 107	12/19/92	8/23/99	Dahhan/B	0/0
DX 20	7/15/93	7/15/93	Dahhan/B	0/0

<u>Exhibit</u>	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 21	7/15/93	4/20/99	Scott/B, BCR	0/0
DX 22	7/15/93	4/22/99	Wheeler/B, BCR	0/0
DX 54	7/15/93	5/21/99	Gogineni/B, BCR	0/0
DX 106	9/21/95	8/5/99	Scott/B, BCR	0/0
DX 106	9/21/95	8/5/99	Wheeler/B, BCR	0/0
DX 75	9/13/96	7/26/98	Navani/B, BCR	0/0
DX 23	9/13/96	4/20/99	Scott/B, BCR	0/0
DX 24	9/13/96	4/22/99	Wheeler/B, BCR	0/0
DX 71	2/10/97	2/11/97	Lee/BCR	no mention of pneumoconiosis
DX 72	2/10/97	7/26/98	Navani/B, BCR	0/0
DX 25	2/10/97	4/20/99	Scott/B, BCR	0/0
DX 26	2/10/97	4/22/99	Wheeler/B, BCR	0/0
DX 40	4/17/97	4/17/97	Saha/BCR	no mention of pneumoconiosis
DX 72	4/17/97	7/26/98	Navani/B, BCR	0/0
DX 27	4/17/97	4/20/99	Scott/B, BCR	0/0
DX 28	4/17/97	4/22/99	Wheeler/B, BCR	0/0
DX 77	5/15/97	5/15/97	Lee/BCR	no mention of pneumoconiosis
DX 78	5/15/97	7/26/98	Navani/B, BCR	0/0
DX 29	5/15/97	4/20/99	Scott/B, BCR	0/0
DX 30	5/15/97	4/22/99	Wheeler/B, BCR	0/0
DX 31	5/15/97	4/20/99	Scott/B, BCR	0/0
DX 9 and 79	7/28/97	7/28/97	Lee/BCR	no mention of pneumoconiosis
DX 80	7/28/97	7/26/98	Navani/B, BCR	0/0
DX 32	7/28/97	4/22/99	Wheeler/B, BCR	0/0
DX 9 and 81	10/14/97	10/14/97	Lee/BCR	no mention of pneumoconiosis

<u>Exhibit</u>	Date of X-ray	Date of Reading	Physician/ Qualifications	<u>Interpretation</u>
DX 82	10/14/97	7/26/98	Navani/B, BCR	Film Grade 2no reading
DX 33	10/14/97	4/20/99	Scott/B, BCR	0/0
DX 34	10/14/97	4/22/99	Wheeler/B, BCR	0/0
DX 9 and 83	11/14/97	11/15/97	Lee/BCR	no mention of pneumoconiosis
DX 84	11/14/97	7/26/98	Navani/B, BCR	Film Grade 3no reading
DX 35	11/14/97	4/20/99	Scott/B, BCR	0/0
DX 36	11/14/97	4/22/99	Wheeler/B, BCR	0/0
DX 85	7/5/98	7/5/98	Saha/BCR	no mention of pneumoconiosis
DX 86 and 87	7/5/98	7/26/98	Navani/B, BCR	0/0
DX 37	7/5/98	4/20/99	Scott/B, BCR	0/0
DX 38	7/5/98	4/22/99	Wheeler/B, BCR	0/0
DX 9	10/14/98	10/14/98	Saha/BCR	pneumonia
DX 9	10/15/98	10/15/98	Navani/B, BCR	no mention of pneumoconiosis
DX 9	10/17/98	10/17/98	Lee/BCR	no mention of pneumoconiosis
DX 9	10/19/98	10/19/98	Navani/B, BCR	no mention of pneumoconiosis
DX 9	10/22/98	10/22/98	Navani/B, BCR	no mention of pneumoconiosis

B. Pulmonary Function Studies

Subsection (b)(2)(i) of Section 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1 (forced expiratory volume in one second) values less than or equal to the values specified in Appendix B to Part 718 and such tests reveal FVC (forced expiratory) values or MVV (maximum voluntary ventilation) values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove a totally disabling

Exhibit/	Physician	Age/ <u>Height</u>	<u>FEV</u> 1	<u>FVC</u>	MVV
DX 112 9/7/73	Froman	44/72"	3	ı	72.7
DX 102; DX 113-9 2/1/92	Ankobiah	63/65"	2.56	4.32	99
DX 113 5/14/92	Dahhan	63/65"	2	3.29	77.8
DX 113-11 6/4/92	Broudy	63/66"	1.96	3.58	61
DX 89 7/1/92	Anderson	63/66"	2.54	3.62	
DX 102 11/10/92	Dahhan	64/64.5"	2.07	3.25	67.5
DX 7 12/19/92	Wright	64/65"	2.19	4.03	76
DX 8 8/10/93	Dahhan	65/65"	2.5	4.02	75.1

C. Arterial Blood Gas Studies7

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>pCO</u> ₂	<u>pO</u> ₂
DX 102; DX 113-15	2/18/92	Ankobiah	39 37.8*	78.2 91*
DX 113	5/14/92	Dahhan	33.9	75.9

respiratory impairment under this subsection of the regulations. 20 $C.F.R.\S~718.204(b)(2)(i)$ and Appendix B.

Subsection 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of $_{\rm p}{\rm CO}_2$ to $_{\rm p}{\rm O}_2$, which indicates the presence of totally disabling impairment in the transfer of oxygen from the

claimant's lung alveoli to his blood. 20 C.F.R. § 718.204(b)(2) and Appendix C, Part 718. The test results must meet or fall below the table values set forth in Appendix C, Part 718 of the regulations.

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	pCO ₂	<u>pO</u> ₂
			33.9*	90*
DX 102	11/10/92	Dahhan	35.5	82.8
DX 10	12/19/92	Wright	39	82
DX 11	12/18/95	Colton	37.8	75
DX 69	2/11/97	Lee County Hosp.	39.5	73
DX 70	4/17/97	Lee County Hosp.	34.4	81
DX 12	7/28/97	Faryal	35.5	74
DX 13	10/14/97	Lee County Hosp.	40.3	87
DX 97	10/14/98	Lee County Hosp.	33.2	122
*aft	er exercise			

*after exercise

D. Medical Reports

The earliest medical reports document several of the miner's visits to the hospital emergency room for chest pain and other non cardio-pulmonary conditions. (EX 2,3,5,6; EX 1; EX 4).

On February 28, 1992, Dr. William Ankobiah examined the miner for evaluated his pulmonary condition. (DX 113-12). Dr. Ankobiah noted a smoking history of one pack of cigarettes a day for 17 years and 18 years of coal mine employment. The miner's chest x-ray was reported as positive. Pulmonary function testing revealed moderate obstructive lung defect. Dr. Ankobiah also considered the miner's symptoms (chronic cough and wheezing attacks in cold weather), the results of blood gas studies, and his findings on physical examination. He diagnosed chronic bronchitis and interstitial pulmonary disease due to coal workers' pneumoconiosis and dust exposure. He attributed the diagnosis to the miner's history of smoking and "hyper responsive airway." This physician believed the miner had a moderate respiratory impairment which would worsen if he were further exposed to coal dust. However, he believed that it was possible for Mr. Robbins to perform another occupation outside of coal mining if "fully evaluated and treated." The record shows that Dr. Ankobiah is an internist. (DX 102).

On May 14, 1992, Dr. A. Dahhan, who is an internist and pulmonary specialist, evaluated Mr. Robbins' pulmonary condition. (DX 113-13). He considered a coal mine employment history of 33 years and a 27-year smoking history of one pack of cigarettes daily, as well as the miner's symptoms, a negative x-ray reading, normal blood gases, a pulmonary function study which showed a mild obstructive defect, and his findings

on physical examination. Dr. Dahhan found no evidence of coal workers' pneumoconiosis or pulmonary disability. He found a mild obstructive ventilatory defect, but no resultant disability, and stated that the miner retained the respiratory capacity to continue his previous coal mining employment or job of comparable physical demand. During his deposition on July 20, 1992, Dr. Dahhan repeated his conclusions that the miner did not have pneumoconiosis, or a respiratory or pulmonary impairment. (DX 113-31).

On June 4, 1992, the miner was examined by Dr. Bruce Broudy, a board-certified pulmonary specialist. (DX 113-14) Dr. Broudy reported that the miner's chest x-ray showed no evidence of coal worker's pneumoconiosis, pulmonary function studies showed moderate obstructive airways disease, and arterial blood gases revealed mild resting hypoxemia. Dr. Broudy also noted the miner's coal mining and smoking history. He diagnosed chronic bronchitis with moderately severe chronic airways obstruction. However, Dr. Broudy did not believe Mr. Robbins had coal workers' pneumoconiosis and found no significant pulmonary disease resulting from his coal mining occupation. Dr. Broudy added that Mr. Robbins, at that time, "probably retained the respiratory capacity to do his previous work as a coal miner." (DX 113-14, see also DX 113-33, deposition of Dr. Broudy, dated July 28, 1992)

On July 12, 1992, Dr. William Anderson, who is board certified in internal medicine, with a sub-specialty in pulmonary diseases, performed a pulmonary examination on Mr. Robbins, and ordered a pulmonary function study and x-ray. (DX 29; DX 89) Dr. Anderson's report states that a blood gas study was also performed, but his documents do not show that one was completed. Based on his exam, the miner's history and symptoms, a positive x-ray reading of 1/0, and a minimal decrease in pulmonary function manifested on pulmonary function testing, Dr. Anderson diagnosed simple pneumoconiosis. He rated the miner's impairment under the AMA Guides as a Class 2, 10-15% impairment. It was Dr. Anderson's opinion that the miner was physically able, from a pulmonary standpoint, of doing his usual coal mine employment. In a subsequent deposition, dated January 12, 1993, Dr. Anderson stated that the miner's reduced lung function was due to his arteriosclerotic heart disease and not pneumoconiosis. (DX 102).

Dr. Dahhan again examined Mr. Robbins, in November of 1992, and ordered further testing. The x-ray was negative. Blood gases were normal, and pulmonary function testing revealed a mild obstructive defect. (DX 102). Dr. Dahhan again found no evidence of coal workers' pneumoconiosis and believed the miner was still physically able to perform his usual coal mine work.

Dr. Ballard D. Wright examined Mr. Robbins on December 19, 1992 and ordered an x-ray, blood gas test and pulmonary function test. (DX

39) Dr. Wright diagnosed coal workers' pneumoconiosis based on a positive x-ray, Category 1/1, chronic bronchitis, arteriosclerotic heart disease and mild obesity. Dr. Wright indicated that the pulmonary function study showed a mild obstructive impairment, but he invalidated the test. However, Dr. Wright attributed any abnormalities in lung function to the patient's smoking history and concluded that the miner could still perform the work of a coal miner, in view of his normal physical examination of the chest and normal blood gases.

In 1996, Mr. Robbins was hospitalized with symptoms of "jerking, chills and fever." (DX 65) Dr. Patrick Molony, the attending physician, diagnosed: 1) urinary tract infection; 2) advanced Alzheimer's; 3) dysphagia; and 4) chronic obstructive pulmonary disease. Dr. Molony made no mention of coal workers' pneumoconiosis or any occupational lung disease.

Mr. Robbins was hospitalized several times in 1997 and early 1998, with Dr. Molony usually attending. Each time, the doctors who examined Mr. Robbins concluded that he was suffering from Alzheimer's disease, Parkinson's disease, dementia and, often, a urinary tract infection. (DX 9; DX 40-41; DX 66-68). The following conditions were also diagnosed during this period: chronic obstructive pulmonary disease, acute bronchitis, old cerebral vascular accident and acute bronchopneumonia. Neither pneumoconiosis nor any other occupational acquired lung disease was mentioned in these medical records. In 1998, the miner was hospitalized more frequently with the same diagnoses and treatment. In January of 1998, Dr. Molony listed a "history" of coal workers' pneumoconiosis, but did not indicate that he was actively treating the miner for that disease. (DX 9)

In October of 1998, the miner was admitted to the hospital for treatment of his various illnesses. (DX 9) On October 23, 1998, the miner died in the hospital and Dr. Molony final diagnoses' included: 1) bronchopneumonia; 2) urinary tract infection; 3) history of Alzheimer's disease 6) Parkinson's disease; 4) post old a cerebrovascular accident; 5) chronic obstructive pulmonary disease; and 6) coal worker's pneumoconiosis.

A postmortem right lung biopsy was performed by Dr. Raymond Ricardo, who diagnosed "acute lobular pneumonia ..., multiple deposits of black particulate pigment, perivascular, peribroncheolar, peribronchial and subpleural areas, consistent with carbonaceous pigment deposits, emphysema, focal and mild. (DX 9) Dr. Ricardo commented that "the carbon pigment deposits are rarely associated with focal and minute fibrosis, consistent with incipient or mild simple coal miner's pneumoconiosis."

Dr. Molony completed the death certificate and listed the cause of death as respiratory failure, due to bronchopneumonia, with the related conditions of cerebral vascular accident and (atherosclerotic) cardiovascular disease. (DX 6; DX 97, DX 98).

Dr. P. Raphael Caffrey, a board-certified clinical and anatomical pathologist, reviewed the medical records, including the pathology slides and report. (DX 42) On April 28, 1999, Dr. Caffrey completed a consulting report based on his review and concluded that he could not make a diagnosis of coal workers' pneumoconiosis or any other occupational pneumoconiosis. He believed that any pulmonary problems Mr. Robbins had were related to his years of cigarette smoking. He stated, unequivocally, that Mr. Robbins' coal mining employment did not cause, contribute to or hasten his death.

Dr. Richard L. Naeye, a board-certified pathologist, also reviewed the miner's medical evidence and pathology report and completed a consulting report on June 5, 1999. (DX 47). Dr. Naeye found that coal workers' pneumoconiosis was absent in the lungs, because there were no anthracotic micronodules present and the single anthracotic macule which was observed did not meet the minimal criteria for a diagnosis of simple coal worker's pneumoconiosis. He concluded that the miner's death was due to widespread acute lobular pneumonia and that the patient "would have died at the same time and in the same way if he had never mined coal."

On April 25, 2000, Dr. Gregory Fino, board-certified in internal medicine and pulmonary disease, completed a consulting report based on his review of all medical evidence of record. (EX 10). Dr. Fino concluded that the miner did not have pneumoconiosis or an occupationally acquired pulmonary condition. Instead, he diagnosed a mild respiratory impairment due to smoking, and found that the miner, from a respiratory standpoint, was neither partially nor totally disabled from coal mine employment. He believed the miner was disabled by multiple neurological diseases which were neither caused by, nor contributed to by inhalation of coal dust. Dr. Fino further opined that death was due to complications of neurological diseases primarily pneumonia and that coal mine dust inhalation neither contributed to nor hastened his death.

III. The Miner's Claim

Because the underlying claims for benefits were filed by both the miner and his widow after March 31, 1980, entitlement to benefits must be determined under the regulations at Part 718. To establish entitlement in the miner's claim, the Claimant must establish by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R.

§§ 718.2, 718.202, 718.203, 718.204; Gee V. W.G. Moore & Sons, 9 BLR 1-4, 1-5 (1986); Roberts V. Bethlehem Mines Corp., 8 BLR 1-211, 1-212 (1985). Failure to establish any of these elements preclude entitlement. See Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (19898); Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987).

The adjudication of the miner's claim is also governed by Sections 725.309 and 725.310.⁸

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and implemented by Section 725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. 20 C.F.R. § 725.310(a). Generally, under the rules governing an appeal from the denial of a modification request, the Administrative Law Judge has a duty to reconsider all the evidence for a mistake of fact or a change in conditions. Jonida Trucking, Inc. v. Hunt, 124 F. 3d 739 (6th Cir. 1997). In so doing, the Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 256 (1971). A modification request need not specify any factual error or change in conditions. Consolidation Coal v. Director, OWCP [Worrell], 27 F. 3d 227 (6th Cir. 1994).9 Rather, the Claimant may merely allege that the ultimate fact, total disability from pneumoconiosis arising out of coal mine employment, was incorrectly decided. Id. Since the instant appeal is from the denial of modification by the district director, I will proceed to the merits of the claim without undertaking a preliminary analysis of whether the Claimant has established the basis for modification of the district director's determination. See Motichak v. Bethenergy Mines, Inc., 17 BLR

The amendments to the regulations at 20 C.F.R. §§ 725.309 and 725.310 do not apply to claims, such as this, which were pending on January 19, 2001. Rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. See 20 CC.F.R. 725.2(c), 65 Fed. Reg. 80, 957 (2000)

 $^{^9}$ Since the miner last engaged in coal mine employment in the State of Kentucky, this matter arises within the jurisdiction of the Sixth Circuit Court of Appeals. Shupe v. Director, OWCP, 12 BLR 1-200 (1989)(en banc).

1-14(1992); Kott v. Director, OWCP, 17 BLR 1-9 (1992); Cooper v. Director, OWCP, 11 BLR 1-95 (1988).

Where, as here, a claimant files a new claim more than one year after a prior denial and submits new evidence in an attempt to establish entitlement to benefits, the provisions of 20 C.F.R. 725.309(d) also apply. The instant claim must therefore be denied on the same grounds as the previous denial unless the Claimant can demonstrate a "material change in conditions." This provision is intended to provide the claimant, whose condition may have worsened, relief from the ordinary principles of res judicata.

The standard for determining whether a material change has occurred in the United States Court of Appeals for the Sixth Circuit was set forth in Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1994). In Sharondale, the Sixth Circuit adopted the interpretation of the Director of the duplicate claim provision at 20 C.F.R. § 725.309. Thus, the Sixth Circuit held that Section 725.309 requires a claimant to prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. ¹⁰ Accordingly, the evidence submitted since August 31, 1993, the date of denial of the prior claim. If at least one of the elements previously adjudicated against Claimant is established by the newly submitted evidence, then a material change in conditions will have been established and this present claim will not be denied on the basis

The standard for determining whether a change in conditions has occurred under Section 725.310 is substantially the same standard set forth in Sharondale. Under Section 725.310, Administrative Law Judge is required to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element entitlement which defeated entitlement in the prior decision. v. Hunt Branch Coal Co., BRB No. 92-1418 BLA (Nov. 22, 1994). See also Napier v. Director, OWCP, 17 BLR 1-111 (1993); Nataloni v. Director, OWCP, 17 BLR 1-82 (1993). Furthermore, "if the newly submitted evidence is sufficient to establish modification . Administrative Law Judge must consider all of the evidence of record to determine whether the Claimant has established entitlement to benefits on the merits of the claim." Kovac v. NBCR Mining Corp., 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992). Since this claim must also be considered under Section 725.309, a determination of change in condition under Section 725.310 is subsumed in an analysis Section 725.309.

of the prior denial. Rather, at that point, the entire record must be reviewed *de novo*.

A. <u>Pneumoconiosis</u>

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. The claimant can demonstrate pneumoconiosis by means of: 1) x-rays interpreted as positive for the disease; 2) biopsy or autopsy evidence; 3) the presumptions set forth in Sections 718.304, 718.305, or 718.306, if found to be applicable; or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Section 718.202 (a)(1) provides that a chest x-ray conducted and classified in accordance with Section 718.102 may form the basis for a finding of the existence of pneumoconiosis. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1,2,3,A,B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0 or 0/-, does not constitute evidence of pneumoconiosis.

The overwhelming weight of the x-ray readings submitted both before and since August 31, 1993, the date of the denial of the prior claim, including those readings by the most highly qualified readers, is negative for the existence of pneumoconiosis. I assign the greatest probative weight to the readings by dually qualified readers, who are both B-readers and board-certified radiologists, and find that the Claimant has not presented evidence sufficient to establish pneumoconiosis or to show a material change in Mr. Robbins' medical condition from the time of the denial of his prior claim until his death. See Woodward v. Director, OWCP, 991 F.2d 314 (6th Cir. 1993); Adkins v. Director, OWCP, 958 F.2d 49 (4th Cir. 1992).

A biopsy or autopsy conducted and reported in compliance with Section 718.106 may also be the basis for finding the existence of pneumoconiosis. 20 C.F.R. § 718.202(a)(2). Although Dr. Ricardo mentioned the presence of black particle pigment in his pathology report, his final comment was equivocal as to whether the patient actually suffered from pneumoconiosis at the time of his death. After a review of the slides and the report, two board-certified pathologists (Drs. Naeye and Caffrey) concluded that the biopsy did not reveal evidence of coal worker's pneumoconiosis. Therefore, I find that the weight of the biopsy evidence is insufficient to establish pneumoconiosis. Thus, a change in the miner's condition since the denial of his prior claim has not been established under Section 718.202(a)(2).

Section 718.202(a)(3) provides that it shall be presumed that a miner is or was suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305 or 718.306 are applicable. No x-ray evidence of complicated pneumoconiosis is present in the record and, thus, Section 718.304 is inapplicable. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Section 718.306 is not relevant because it is only applicable to survivors' claims filed prior to June 30, 1982. Since none of the presumptions are applicable to this claim, the Claimant cannot show a change in condition since the prior denial under subsection (a)(3).

The fourth means by which the Claimant may establish the existence of pneumoconiosis is set forth in Section 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that a miner suffers from pneumoconiosis. Any such finding must be based upon objective medical evidence and supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. Id.

The reports of the physicians who examined the miner since the denial of his prior claim related to hospitalizations between 1996 and 1998. The diagnosis of COPD by Drs. Irvin and Taylor are insufficient to establish pneumoconiosis as neither physician stated the cause of the condition. Dr. Molony treated the miner frequently over a significant period of time. However, Dr. Molony did not report that he actively treated the miner for pneumoconiosis and listed pneumoconiosis only as part of his final diagnoses in October of 1998. It is noteworthy that, although Dr. Molony reported a history of pneumoconiosis, and diagnosed COPD and acute bronchitis, he did not provide an independent rationale for including pneumoconiosis in his diagnosis, or attribute coal mine employment as a cause for COPD and bronchitis. Also, none of these conditions were listed on the death certificate as conditions contributing to the miner's death.

The majority of pulmonary specialists and pathologists who either examined Mr. Robbins or reviewed his medical evidence and biopsy evidence concluded that he did not suffer from pneumoconiosis during his lifetime. I assign greater probative weight to the opinions of Drs. Caffrey, Naeye and Fino, because of their specialized expertise in either pulmonary medicine or pathology. Coleman v. Ramey Coal Co., 18 BLR 1-9 (1993); Burns v. Director, OWCP, 14 BLR 1-2 (1989); Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Revnack v. Director, OWCP, 7 BLR 1-771 (1985). Moreover, their reports are accorded significant probative weight as reasoned medical opinions. See McClendon v.

Drummond Coal Co., 12 BLR 2-108 (11^{th} Cir. 1988). Upon consideration of all the physician opinion reports submitted since the denial of the prior claim, I find the evidence insufficient to establish the presence of pneumoconiosis or a change of condition under § 718.202(a)(4).

B. Total Disability Due to Pneumoconiosis

The miner must also show, along with the existence of pneumoconiosis, that he is totally disabled due to pneumoconiosis. A miner shall be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. The irrebuttable presumption set forth at Section 718.304 provides that if a miner is suffering from a chronic dust disease of the lung which yields one or more large opacities on chest x-ray, which would be classified as Category A, B, or C, or one or more massive lesions on biopsy, then such miner shall be presumed to be totally disabled due to pneumoconiosis. 20 C.F.R. §§ 718.204(b) and 718.304. There is no such evidence of record and, thus, total disability is not established by the irrebuttable presumption of Section 718.304 as provided in Section 718.204(b).

Total disability may also be established if pneumoconiosis prevents a miner from performing his usual coal mine work or comparable and gainful employment. 20 C.F.R. §§ 718.204(b)(1)(i)-(ii). In the absence of contrary probative evidence, evidence which meets the criteria set forth at Sections 718.204(b)(2)(i) through 718.204(b)(2)(iv) may establish total disability. I note at the outset that subsection (b)(2)(iii) is not applicable here because there is no evidence the miner suffered from $cor\ pulmonale$ with right-sided congestive heart failure. Likewise, subsection 781.204(d)(1) is not applicable to the miner's claim because that section is only available in survivors' claims.

None of the pulmonary function studies submitted since the denial of the prior claim resulted in qualifying values under Part 718. Therefore, I find that the ventilatory studies do not support a finding of a change in condition under Section 718.204((b)(2)(i) following the denial of his previous claim.

Likewise, none of the blood gas studies revealed qualifying values under Section 718.204(b)(2)(ii). Therefore, evidence does not establish a change in condition since the denial of the prior claim under this subsection.

Where a claimant cannot establish total disability under subsections (b)(2)(i), (b)(2)(ii), (b)(2)(iii), subsection (b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory

diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

None of the physicians who evaluated his pulmonary condition prior to the denial of his prior claim in 1993 found him to be totally disabled by a respiratory impairment. Drs. Ankobiah's opinion that Mr. Robbins should not be further exposed to coal mine dust does not equate to an opinion that he was totally disabled due to pneumoconiosis. Zimmerman v. Director, OWCP, 871 F.2d 564, 567 (6th Cir. 1989); Taylor v. Evans and Gambrel Company, Inc., 12 BLR 1-83 (1988). See also the medical opinions of Drs. Dahhan, Broudy, Anderson and Wright (DX 113-31, 113-14, DX 89, DX 102, EX 39 and DX 113-33). Since the denial of the prior claim, Dr. Fino reviewed the medical records and evaluated the miner's pulmonary condition. He did believe the miner was disabled due to neurological diseases unrelated to coal dust inhalation, such as Alzheimer's , Parkinson's, and previous strokes. He did not find the miner to be totally disabled from coal mine employment. Similarly, the attending physicians during the miner's most recent hospitalizations prior to his death did not address the issue of whether he had a disabling respiratory impairment related to his coal mine employment. In conclusion, since the evidence does not show that the miner became totally disabled due to a respiratory disease related to his coal mine employment after the denial of his prior claim, the Claimant has not established a change in condition under subsection (b)(2)(iv).

After consideration of all the medical evidence submitted since the denial of the prior claim, I find that the Claimant has failed to establish a change in condition after the denial of the miner's prior claim. Therefore, the instant claim must be denied on the basis of the denial of the prior claim pursuant to Section 718.309.

IV. Widow's Claim

Because Mrs. Robbins filed her application for survivor's benefits after March 31, 1980, her claim for survivor's benefits will be adjudicated under the regulations at 20 C.F.R. Part 718. Under the applicable regulations, the claimant, in addition to establishing that the deceased miner suffered from pneumoconiosis arising out of coal mine employment at the time of his death, see Trumbo v. Reading Anthracite Co., 17 BLR 1-85, 1-88 (1993), must establish by a preponderance of the evidence that the decedent's death was caused by pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to his death, that pneumoconiosis hastened death, or that the miner had complicated pneumoconiosis. Brown v. Rock Creek Mining Co., 996 F. 2d 812, 17 BLR 2-135 (6th Cir. 1993). See also Neely v. Director, OWCP, 11 BLR 1-85 (1988). Failure to establish any of these elements precludes entitlement to benefits.

A. Pneumoconiosis and Death Due to Pneumoconiosis

For the same reasons set forth, above, in the analysis of the miner's claim, I find the evidence does not establish that the miner suffered from pneumoconiosis at the time of his death. However, even assuming Claimant could establish the existence of pneumoconiosis, she must also show, under Section 718.205(c), that the miner's death was due to pneumoconiosis in any of the following circumstances: (1) where competent medical evidence establishes that the miner's death was due to pneumoconiosis; (2) where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis; or (3) where the presumption set forth at Section 718.304 is applicable. As discussed at page 14 supra, the presumption at Section 718.304 is not applicable in this case there is no evidence of complicated pneumoconiosis.

Like several other federal circuits, the United States Court of Appeals for the Sixth Circuit has interpreted "substantially contributing cause" to include a hastening of the miner's death. Griffith v. Director, OWCP, 49 F.3d 184, 186 (6th Cir. 1995). See Peabody Coal Co. v. Director, OWCP, 972 F.2d 178, 183 (7th Cir. 1992); Shuff v. Cedar Coal Co., 967 F.2d 977, 980 (4th Cir. 1992). This interpretation means that any acceleration of the miner's death that is attributable to pneumoconiosis will entitle Claimant to benefits. Griffith, 49 F.3d at 186.

The death certificate, completed by a doctor who was familiar with the miner's condition prior to the time of his death, listed respiratory failure as the cause of death and three other conditions as contributing causes, with none of the conditions being pneumoconiosis. Not one medical report contains any indication that pneumoconiosis contributed to the miner's death, in any way. All of the physicians who were highly qualified in the areas of pulmonary medicine and pathology unequivocally stated that pneumoconiosis did not contribute or hasten the miner's death. For the same reasons explained above, I assign greater probative weight to those opinions by Drs. Caffrey, Fino, and Naeye. See also, the opinions of Drs. Dahhan and Broudy at DX 102, DX 113-31, and DX 113-14. Thus, Claimant has not shown the miner's death was due to pneumoconiosis, as defined under Section 718.205(c).

Conclusion

In sum, the medical evidence does not establish the existence of pneumoconiosis, or that the miner's death was due to or hastened by pneumoconiosis. Accordingly, Mrs. Robbins is not entitled to survivor's benefits under the Act.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for legal services rendered in pursuit of the claim.

ORDER

The claims of Hershel C. Robbins and Anna Ruth Robbins for benefits under the Act are **DENIED**.

MOLLIE W. NEAL Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of the Decision and Order by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the notice of appeal must also be served on Donald S. Shire, Esquires, Associate Solicitor for Black Lung Benefits, Francis Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210. The award of an attorney's fee under the Act is permitted only in cases which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of

any fee to Claimant for representation of services rendered to Claimant in pursuit of this claim.